

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEODORE KAGAN, JAMES AVEN,	)	Case No. 09-5337 SC
FRANCES LEVY, ELAINE SOFFA, JOSEPH	)	
SOFFA, and ALBERKRACK FAMILY	)	ORDER DENYING NAMED
LIMITED PARTNERSHIP, on behalf of	)	DEFENDANTS' MOTION TO
themselves and all others	)	DISMISS PLAINTIFFS' AMENDED
similarly situated,	)	<u>COMPLAINT</u>

Plaintiffs,

v.

WACHOVIA SECURITIES, LLC, a North  
Carolina limited liability  
company; WACHOVIA SECURITIES  
FINANCIAL NETWORK, LLC, a  
North Carolina limited liability  
company; WACHOVIA CAPITAL MARKETS,  
LLC, a North Carolina limited  
liability company; WELLS  
FARGO ADVISORS, LLC, a Delaware  
limited liability company; WELLS  
FARGO ADVISORS FINANCIAL NETWORK,  
LLC, a Delaware limited liability  
company; WELLS FARGO SECURITIES,  
LLC, a Delaware limited liability  
company; WELLS FARGO & COMPANY, a  
Delaware corporation; and DOES 1  
through 10, inclusive,

Defendants.

**I. INTRODUCTION**

Now before the Court is a Motion to Dismiss ("Motion") filed by Defendants Wells Fargo Advisors LLC; Wells Fargo Advisors Financial Network, LLC; Wells Fargo Securities, LLC; and Wells

1 Fargo & Company (collectively, "Named Defendants"). ECF No. 42.  
2 Plaintiffs Theodore Kagan, James Aven, Frances Levy, Elaine Soffa,  
3 Joseph Soffa, and the Alberkrack Family Limited Partnership  
4 (collectively, "Plaintiffs") filed an Opposition. ECF No. 43.  
5 Named Defendants submitted a Reply. ECF No. 44. Having considered  
6 the papers submitted by all parties, and for the reasons stated  
7 below, the Court DENIES the Motion.

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9 **II. BACKGROUND**

10 The following allegations are taken from Plaintiffs' Amended  
11 Complaint. Plaintiffs are beneficial owners of securities issued  
12 by Asia Pulp and Paper Company, Ltd. ("APP"). Docket No. 35 ("Am.  
13 Compl.") ¶¶ 2-7. Defendants, or their predecessors in interest,  
14 are brokerage firms and the nominee or record owners of the APP  
15 securities. Id. ¶¶ 1, 8-15, 18, 23. While the nominee or record  
16 owners appear on official corporate transfer records, the actual  
17 interest in the stock is that of the beneficial owner. Id. ¶ 18.

18 On August 8, 2001, APP was sued in the Southern District of  
19 New York for violations of securities law. Id. ¶ 19. On October  
20 13, 2005, the District Court preliminarily approved a settlement in  
21 the action. The District Court's order included the following  
22 provision:

23 The Claims Administrator shall use reasonable  
24 efforts to give notice to nominee owners such  
25 as brokerage firms and other persons or  
26 entities who purchased APP Instruments during  
27 the Class Period as record owners but not as  
28 beneficial owners. Such nominee purchasers are  
directed, within seven (7) days of receipt of  
the Notice, to either forward copies of the  
Notice and Proof of Claim to their beneficial  
owners, or to provide the Claims Administrator  
with lists of the names and addresses of the

beneficial owners, and the Claims Administrator is ordered to send the Notice and Proof of Claim promptly to such identified beneficial owners.

Id. ¶ 21. The Notice of Pendency of Class Action and Proposed Settlement, dated November 30, 2005, contains a similar requirement. Id. ¶ 22. Plaintiffs allege that Defendants, or their predecessors in interest, failed to forward copies of the Notice and Proof of Claim to the beneficial owners of APP securities, and failed to provide the Claims Administrator with lists of the names and addresses of the beneficial owners. Id. ¶¶ 3, 24. Plaintiffs allege that if they had been notified, they would have submitted claims and obtained a recovery. Id. ¶¶ 25-36. Plaintiffs have filed a putative class-action lawsuit against Defendants.

On July 7, 2010, the Court dismissed with leave to amend Plaintiffs' claims for negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing. ECF No. 32 ("Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss"). Plaintiffs' Amended Complaint alleges negligence, breach of fiduciary duty, and breach of contract. Am. Compl. ¶¶ 47-62.

### **III. LEGAL STANDARD**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.

1 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
2 1990). Allegations of material fact are taken as true and  
3 construed in the light most favorable to the nonmoving party.  
4 Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.  
5 1996). "When there are well-pleaded factual allegations, a court  
6 should assume their veracity and then determine whether they  
7 plausibly give rise to an entitlement to relief." Ashcroft v.  
8 Iqbal, 129 S.Ct. 1937, 1950 (2009). A motion to dismiss should be  
9 granted if the plaintiff fails to proffer "enough facts to . . .  
10 nudge[] their claims across the line from conceivable to  
11 plausible." Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007).  
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#### 13 **IV. DISCUSSION**

14 In their Reply brief, Named Defendants withdraw their motion  
15 to dismiss insofar as it sought dismissal of Plaintiffs' negligence  
16 claim on statute of limitations grounds. Reply at 1 n.1.  
17 Therefore the only issue for the Court to decide is whether the  
18 Amended Complaint states a claim for breach of contract.

19 The Amended Complaint alleges that Plaintiffs and the putative  
20 class members "entered into a contract with Defendants for  
21 brokerage services." Am. Compl. ¶ 59. Plaintiffs allege that:

22 One of the terms of the brokerage services  
23 agreement was that Defendants would provide  
24 Plaintiffs and the Class with all relevant  
25 information and communications they receive  
26 pertaining to Plaintiffs' and the Class'  
securities, including those held in Defendants'  
name for the benefit of Plaintiffs and the  
Class.

27 Id. ¶ 60. The Amended Complaint therefore alleges that a specific  
28 term of the brokerage services agreement between Plaintiffs and

1 Defendants required Defendants to provide information pertaining to  
2 securities to Plaintiffs, and that Defendants breached this  
3 obligation by failing to notify Plaintiffs of the APP settlement.  
4 Accepting these factual allegations as true, they are sufficient to  
5 nudge Plaintiffs' breach of contract claim across the line from  
6 conceivable to plausible. The Court DENIES the Named Defendants'  
7 motion to dismiss the third cause of action in the Amended  
8 Complaint.

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10 **V. CONCLUSION**

11 For the foregoing reasons, the Court DENIES the Named  
12 Defendants' Motion to Dismiss.

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14 IT IS SO ORDERED.

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16 Dated: November 23, 2010

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18 UNITED STATES DISTRICT JUDGE  
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